

LEONARD M. SINGER

September 16, 2010

BY ELECTRONIC FILING

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, Southwest
Washington, DC 20024

227807

ENTERED
Office of Proceedings

SEP 16 2010

Part of
Public Record

Re: STB Finance Docket # 35397
ABC & D Recycling, Inc.

Dear Ms. Brown:

Filed herewith is the *Opposition to the Town of Ware's Motion For Partial Waiver of 49 CFR 1104.13(c)*.

Please contact me if you have any questions regarding this filing. Thank you very much for your cooperation.

Very truly yours,

Leonard M. Singer

Leonard M. Singer

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BEFORE THE SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35397

ABC & D RECYCLING, INC.

LEASE AND OPERATION EXEMPTION OF A LINE
OF RAILROAD IN WARE, MASSACHUSETTS

**OPPOSITION TO THE TOWN OF WARE'S MOTION
FOR PARTIAL WAIVER OR 49 CFR 1104.13(c)**

ENTERED
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Submitted by:

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BEFORE THE SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35397

**ABC & D RECYCLING, INC.
LEASE AND OPERATION EXEMPTION OF A LINE
OF RAILROAD IN WARE, MASSACHUSETTS**

**OPPOSITION TO THE TOWN OF WARE'S MOTION
FOR PARTIAL WAIVER OR 49 CFR 1104.13(c)**

ABC & D Recycling, Inc. ("ABC & D") hereby opposes the Town of Ware's Motion for Partial Waiver of 49 CFR 1104.13(c) and the Town's request that the Board accept for filing its Verified Sur-Reply of Town of Ware to Verified Reply of ABC & D Recycling, Inc. (hereinafter the "Sur-Reply").

On July 28, 2010 ABC & D filed its Verified Notice of Exemption For Lease and Operation of a Rail Line; on August 17 the Town of Ware filed a Verified Petition to Reject And/or Dismiss Verified Notice of Exemption and Request for Stay of Effective Date of Exemption (hereinafter the "Motion") and on September 2 ABC & D filed its Verified Reply to the Motion. The Town has now moved that it be permitted to file the Sur-Reply.

As demonstrated in this Opposition the Town's proposed Sur-Reply contains no material information that was not or could not have been presented in the Town's original Motion. Accordingly, there is no reason for the Board to grant a waiver of its regulation which prohibits sur-replies.

The Town asserts that ABC & D's reply to its Motion raises the following claims for the first time:

that ABC & D is already virtually a common carrier railroad;

that ABC & D's motivation for its notice of exemption is to protect and enhance its railroad operations; and

that the Town is seeking to terminate ABC & D's business.

Contrary to the Town's arguments, none of these issues are new; none of them come as a surprise to the Town and each is addressed in the Town's original Motion. Indeed, the arguments contained in the Town's proposed Sur-Reply are, in substantial substance, a repetition of arguments made in the Town's original Motion. Each of the supposedly "new" claims is addressed below.

1. The Nature of ABC & D's Operations.

At the very beginning of its Motion, in its summary of the arguments contained in the Motion, the first ground cited by the Town is that ABC & D "has never engaged in common carriage." Then, in support of its argument that ABC & D has never engaged in common carriage, the Town's Motion contains detailed characterizations of ABC & D's construction and demolition debris business and arguments concerning whether or to what extent this business is consistent with common carrier operations. (see Motion at pages 6, 21, 24-25, 33-35).

Manifestly, the Town understood, when it filed its Motion, that it was putting in issue the nature and extent of ABC & D's operations and, in particular, whether or to what extent those operations were consistent with common carrier operations. If there was material that the Town wished the Board to consider relating to the relationship between ABC & D's operations and its proposed status as a common carrier, those argument should have been included in the Town's Motion.

2. ABC & D's Motivation for its Notice of Exemption.

A substantial part of the Town's Motion is devoted to its argument concerning the motivation for ABC & D's desire to become a common carrier. Starting at page 11 of its Motion and continuing for 6 pages, the Town discusses at length why ABC & D wishes to become a common carrier. The Town clearly understood that it was putting in issue ABC & D's motivation for becoming a common carrier. If there was material that the Town wanted the Board to consider in connection with that subject, it should have put that material in its motion.

3. The Town's Effort to Terminate ABC & D's Business.

Another substantial part of the Town's Motion is devoted to a description of the state court litigation and other proceedings between the Town and ABC & D concerning state and local permits. (Motion at pages 8-9 and 11-13). Furthermore, the Town's Motion explicitly acknowledges that the Town is seeking to terminate ABC & D's business. (Motion at page 13 "seeking ... to remedy the zoning violations by removal of the building."). Because the Town considered the continued existence of ABC & D's business to be relevant, it should not have been surprised by the fact that ABC & D dealt with this subject in its response to the Motion.

Finally, as the table attached to this Opposition demonstrates, with respect to all three of the supposedly new claims, the Town's proposed Sur-Reply substantially repeats material contained in its Motion.

RELIEF REQUESTED

ABC & D requests that the Board deny the Town's motion for partial waiver. In the alternative, if the Board sees fit to grant that motion and accept the Town's sur-reply, ABC & D

requests that it be permitted to file a response to that Sur-Reply.

Respectfully Submitted:

/s/ Leonard M. Singer
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CERTIFICATE OF SERVICE

I, Leonard M. Singer, hereby certify that I served the foregoing on all parties. Such service was made by electronically mailing the foregoing to David A. Wojcik, Counsel for the Town of Ware, Jamey Tesler, counsel for the Massachusetts Department of Transportation and Laura Swain, Counsel for the Massachusetts Department of Environmental Protection on September 16, 2010.

/s/ Leonard M. Singer
Leonard M. Singer

**TABLE ANNEXED TO THE OPPOSITION TO THE TOWN OF
WARE'S MOTION FOR PARTIAL WAIVER OR 49 CFR 1104.13(c)**

Material from the Town's proposed Sur-Reply	Corresponding material from the Town's Motion
"ABC & D was incorporated ... to operate a construction demolition recycling facility" (Sur-Reply at page 2)	"ABC & D's Articles of Organization state that [its purpose] is to operate a Construction demolition recycling facility" (Motion at page 5)
"ABC & D's Articles of Organization have never been amended to include common carriage" (Sur-Reply at page 2)	"This stated purpose has never been amended." (Motion at page 6)
"ABC & D ... began the process of becoming a construction and demolition material processing and handling facility ... in 2001" (Sur-Reply at page 3)	"Development of the ABC & D facility ... commenced in July 2001 ... to include ... processing areas for ... construction and demolition materials" (Motion at page 4)
"Since 2001, ABC & D ... sought approvals to operate a facility to handle construction and demolition debris" (Sur-Reply at page 3)	"In July 2001 the O'Riley Family Trust filed an application with the Ware Planning Board for a special permit ... for transfer and recycling of ... construction and demolition materials." (Motion at page 4)
"ABC & D never held itself out as a common carrier or rail carrier" (Sur-Reply at page 3)	"At no time ... has ABC & D ever held itself out as a common carrier" (Motion at page 6)
"ABC & D's interest in becoming a common carrier or rail carrier arose solely because the Town /... denied [its] request ... to handle [municipal solid waste]" (Sur-Reply at page 3)	"Only after denial by the Ware [Board of Health] ... did ABC & D file its ... Notice of Exemption" (Motion at page 11)

“ABC & D decided to file a Notice of Exemption ... because it was unhappy with the results of the permitting process” (Sur-Reply at page 4)

“ABC & D’s Notice of Exemption is motivated solely by a desire to seek refuge under federal preemption” (Sur-Reply at page 3)

“ABC & D ... has been in the business of operating a construction and demolition debris solid waste facility which charges a drop-off fee Those materials then become the property of ABC & D” (Sur-Reply at pages 3 and 7)

“The ABC & D facility has been used ... for the movement of materials owned by ABC & D and not the public” (Sur-Reply at pages 3-4)

“ABC & D is not a rail carrier which operates a solid waste rail transfer facility; rather [it] is a construction and demolition debris handling and processing facility” (Sur-Reply at page 4)

Chronology of the development of ABC & D’s construction and demolition debris business (Sur-Reply at page 4)

“Customers pay ABC & D to accept their construction and demolition materials. ABC & D then sorts and processes the materials which become the property of ABC & D” (Sur-Reply at page 7)

“Attempt to use federal preemption as an end run around state and local denial of what ABC & D previously attempted to do” (Motion at page 29).

“ABC & D’s true motivation in submitting this Notice is ... to obtain the protection of federal preemption” (Motion at page 1)

“ABC & D. ... is ... in the business of charging per ton fees for C & D material which then becomes the property of ABC & D” (Motion at page 6)

“ABC & D is nothing more than a shipper of its own materials.” (Motion at page 33)

“ABC & D has never held itself out as a rail carrier ... but has always held itself as a C & D waste facility” (Motion at page 10)

Chronology of the development of ABC & D’s construction and demolition debris business (Motion at pages 5-6)

“ABC & D. ... is ... in the business of charging per ton fees for C & D material which then becomes the property of ABC & D” (Motion at page 6)

**Chronology of the pending state court
litigation (Sur-Reply at pages 9-10)**

**Chronology of the pending state court
litigation (Motion at pages 7-8, 11-13)**